

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IN RE: :  
PAMIDRONATE PRODUCTS :  
LIABILITY LITIGATION :  
: 09-MD-2120 (KAM) (SMG)  
:  
: December 16, 2010  
:  
: Brooklyn, New York  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE STEVEN M. GOLD  
UNITED STATES CHIEF MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: JOHN JULIEN VECCHIONE, ESQ.  
DANIEL ADAM OSBORN, ESQ.  
ROBERT G. GERMANY, ESQ.

For the Defendants: JAMES W. HUSTON, ESQ.  
ERIN BOSMAN, ESQ.  
CHRISTINA L. GAARDER, ESQ.  
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1 THE CLERK: Hello, everybody. This should be In  
2 Re: Pamidronate Products Liability Litigation, 09-MD-2120.

3 Who will be speaking on behalf of the plaintiffs?

4 MR. VECCHIONE: John Vecchione for the  
5 plaintiffs.

6 MR. OSBORN: And Daniel Osborn for the  
7 plaintiffs.

8 MR. GERMANY: Bob Germany for the plaintiffs.

9 THE COURT: Vecchione, Osborn, and Germany?

10 MR. GERMANY: Yes, sir.

11 THE COURT: Good morning.

12 MR. VECCHIONE: Good morning, Judge.

13 MR. GERMANY: Good morning.

14 THE COURT: And who is on for the defendants?

15 MR. HUSTON: Jim Huston and Erin Bosman for APP  
16 Pharmaceuticals, your Honor. You're very faint. Everybody  
17 else is pretty loud, but you're pretty faint.

18 THE COURT: Is this better?

19 MR. HUSTON: Yes, much. Yes.

20 THE COURT: Okay. I have to literally lean into  
21 the microphone here. We are on the record.

22 Could you announce your appearance again. I'm  
23 sorry.

24 MR. HUSTON: Yes, sir. Jim Huston and Erin  
25 Bosman for APP Pharmaceuticals.

1           THE COURT: Thank you. Who else will be  
2 addressing the Court this morning?

3           All right then. I have Mr. Huston's letter of  
4 December 13 and Mr. Vecchione's letter of December 13.

5           Is there anything else that I should have before  
6 me?

7           MR. HUSTON: I don't think so, Judge.

8           THE COURT: Okay. I am going to confess that I  
9 probably need a little more help having my recollection  
10 refreshed than I ought to, but I am sure that I can count  
11 on you to be of assistance in the generous spirit of the  
12 holidays.

13           First of all, I see that -- let's start with the  
14 small stuff. Let's look at paragraph 5 of Mr. Huston's  
15 letter. In taking the second matter first, I see that  
16 there are two plaintiffs who have decided not to pursue  
17 their claims.

18           Have those plaintiffs filed stipulations  
19 discontinuing them yet? Who represents them?

20           MR. OSBORN: Your Honor, no, for a couple of  
21 reasons: One is we have not had a practice so far -- I'm  
22 sorry. This is Dan Osborn for the plaintiffs.

23           We have not to this date or to this point in time  
24 had a practice of filing individual stipulations. We've  
25 sort of had one go around of a stipulation that included

1 some number of plaintiffs and we had one amended complaint.  
2 We haven't been in the practice of filing individual  
3 stipulations. We can, except by January 7 we will have  
4 been required to file yet another amended complaint, and  
5 that's going to weed some more people out.

6 With respect to these two in particular, Wallace  
7 was never named in either of the complaints. Wilma Melon  
8 (ph.) was in the first complaint, but when we amended she  
9 came out; so she's automatically been removed to dismiss by  
10 virtue of our amendment. So we've not filed stipulations.  
11 We can do that going forward for individuals, but, again,  
12 we're going to end up in a situation where some large  
13 number of people will probably stipulate to dismissal and  
14 we've got another amended complaint to file by January 7.

15 THE COURT: Well, all right. Then let's step  
16 back and go to paragraph 2, and this is really where I need  
17 your help.

18 I do remember some discussion about filing of  
19 complaints on an individual basis, so that when it was time  
20 for cases to be returned to the transferee courts, we could  
21 do it on an approximately plaintiff-by-plaintiff basis.

22 Am I mis-recalling that?

23 MR. OSBORN: Your Honor, again, this is Dan  
24 Osborn.

25 I think we've had at various conferences there's

1 been some discussion about venue; there's been discussion  
2 about direct filing; there's been discussion about  
3 remand --

4 THE COURT: Right.

5 MR. OSBORN: -- through Mr. Miller from my office  
6 was at the last conference, and I believe this issue was  
7 raised.

8 My view at this point is this is somewhat  
9 premature and sort of a make-work exercise. If the cases  
10 were to just proceed on the normal course and the MDL --  
11 you concluded at some point that the MDL had served its  
12 purpose and you asked the panel for a suggestion of remand  
13 -- if that were granted, then these cases would then be set  
14 back to the transferor court.

15 In this case, I think the defendants are  
16 suggesting that that's not necessarily a very viable option  
17 because there's been so much direct filing in the Eastern  
18 District. The cases would be returned to the Eastern  
19 District, even if they don't belong there ultimately. I  
20 don't know that we need to deal with that issue today or  
21 even in the next month. At least, that's my view from the  
22 plaintiffs' side. And, frankly, I think probably when we  
23 get to the end of this, the plaintiffs will stipulate to  
24 transfer to the appropriate venue.

25 So what the defendants, I think, are asking us to

1 do now is move to severe, file individual complaints in  
2 some number of district courts throughout the country.  
3 Once those cases are filed, file the appropriate paperwork  
4 with the judicial panel advising them that there's an MDL.  
5 These cases will then be transferred back to your Honor  
6 where they are now. And then at the end of the MDL, if  
7 your Honor asks for a suggestion of remand, then the cases  
8 could be transferred back to the venue where they were  
9 filed. That just seems like a lot of work that we don't  
10 need to do right now and in any event I suspect that the  
11 plaintiffs will ultimately stipulate to transfer those  
12 cases back to the appropriate venue. That's been done in a  
13 couple of other cases already in a couple of other MDL's,  
14 particularly in the Fosamax Litigation before Judge Keenan.

15 THE COURT: Well, let me ask you this,  
16 Mr. Osborn, before I turn the floor to the other plaintiffs  
17 first and then the defendant:

18 What is your vision of how this case progresses  
19 as an MDL and what procedural steps and discovery steps and  
20 motion practice should occur while it's before this Court  
21 before it spins out?

22 MR. OSBORN: Well, I think --

23 THE COURT: Did I inartfully frame the question  
24 or are you struggling to come up with what you think the  
25 right answer is?

1 MR. OSBORN: No. I'm -- it's -- I think you've  
2 asked me to describe what I expect to happen over the next  
3 6 months, 12 months, 18 months, 2 years.

4 THE COURT: Well, what do you see as the purpose  
5 of the MDL? What is the juncture at which this Court ought  
6 to be saying remand back to the other courts or stipulate  
7 to transfer to the other courts because we're done here.

8 What's the last event or what is the course of  
9 events, generally speaking, as an arc that you see  
10 happening in the Eastern District of New York under the MDL  
11 jurisdiction?

12 MR. OSBORN: I think there would be some limited  
13 discovery of individual plaintiffs. There would be broad  
14 discovery of the defendants, so that the discovery of the  
15 defendants doesn't have to happen in individual cases once  
16 they're remanded. And once there's some limited discovery  
17 of the plaintiffs and the broad discovery of the defendants  
18 and there's some Bellwether trials that would occur before  
19 your Honor or in the Eastern District, and then ultimately  
20 all of the cases would be remanded after the trial of some  
21 number of Bellwether cases.

22 THE COURT: Well, let's assume that ultimately we  
23 defer all of what you describe as unnecessarily premature  
24 paperwork for now, can we at least expect from plaintiffs  
25 an agreement as to the appropriate court where any

1 individual trials should be held and a stipulation to that  
2 effect at this point?

3 MR. OSBORN: On behalf of my clients I would,  
4 your Honor. I don't mean to speak for Mr. Vecchione or  
5 Mr. Germany at this point in time, but we would be prepared  
6 to stipulate to the transfer to the appropriate district  
7 court for trial, yes.

8 THE COURT: Mr. Vecchione, is there anything you  
9 want to add to this?

10 MR. VECCHIONE: Your Honor, I've already severed  
11 my client into different ones. I expect that on January 7  
12 I will file individual complaints in all of those. I  
13 believe that the trial is -- there are only two places  
14 usually where the plaintiffs resides or where they took the  
15 drug, and I am certainly willing to say where that should  
16 be. I think I usually put it in by what law applies, but I  
17 have no problem with that.

18 THE COURT: Mr. Germany?

19 MR. GERMANY: I agree with Mr. Vecchione, Judge.

20 THE COURT: Mr. Huston, what's your take on all  
21 of this? Is there any reason not to defer it? You  
22 anticipate getting these things dismissed, don't you?

23 MR. HUSTON: I think there will be some  
24 dismissals and we can talk about the process of that,  
25 your Honor. I am optimistic and pleased that they have



1 said this because I think that we can come to a conclusion  
2 on which local district court is the proper venue for each  
3 of these cases, and we probably have got to start compiling  
4 such a list. I do agree that there's no need at this point  
5 to try and get them sent back there and then brought back  
6 to the Eastern District. I think we can do that after the  
7 pleadings have gone through. We will have motions, both on  
8 the Iqbal and Twombly type of pleading issues, as well as  
9 the statute of limitations and the others, but we do that  
10 in one or two pleading stages we can discuss. But I think  
11 that we can, based on the plaintiffs' representations, come  
12 to an agreement that after the MDL these can be sent back  
13 to an appropriate jurisdiction, and we will designate those  
14 jurisdictions and the Court can sign such an order.

15 THE COURT: Okay. How long will it take for the  
16 plaintiffs to identify which plaintiffs belongs in which  
17 court and draft something --

18 MR. VECCHIONE: I'll start, your Honor. It's  
19 John Vecchione again.

20 As I said, my view of this is that I have a  
21 deadline to file my complaints. I'm in the process of  
22 doing that, and it will be clear from my complaints, but  
23 I'm also happy to send a letter out saying I filed my  
24 complaints and here's where I think these belong, on that  
25 date as well.

1           THE COURT: If you get such a letter by January 7  
2 from each plaintiff's counsel, is that going to satisfy  
3 you, Mr. Huston?

4           MR. HUSTON: Yes, certainly.

5           THE COURT: All right.

6           MR. HUSTON: If it could also just be put in the  
7 amended complaint to be clear what jurisdiction is the  
8 ultimate proper jurisdiction, but a simultaneous letter or  
9 a listing would be equally adequate.

10          THE COURT: So, Mr. Osborn, you'll comply with  
11 that as well?

12          MR. OSBORN: Certainly, if that's your order,  
13 your Honor. I'm just thinking that by the seventh, I guess  
14 we'll know which plaintiffs are definitively proceeding  
15 anyway. And as Mr. Huston has indicated, that will be  
16 reflected in the document and we can just supplement that  
17 with a letter, I suppose, so that's fine.

18          THE COURT: Right. And, frankly, I agree with  
19 Mr. Huston's suggestion. If it's alleged in the complaint  
20 where the appropriate venue is for each plaintiff, then I  
21 think Mr. Huston's concern is satisfied, right, Mr. Huston?

22          MR. HUSTON: Yes, sir.

23          THE COURT: Okay. So if you allege it in the  
24 complaint, then I don't think a separate stipulation is  
25 necessary, but if you don't allege it in the complaint, and

1 I don't see why you wouldn't, then I suppose we'll have to  
2 have some other vehicle for specifying and a list or letter  
3 accompanying the amended pleading seems like an appropriate  
4 way to address that.

5 MR. HUSTON: Right.

6 THE COURT: Does that deal with your venue  
7 paragraph, Mr. Huston, or have I left something out?

8 MR. HUSTON: Yes, sir. No, I think that does.

9 THE COURT: Okay.

10 MR. VECCHIONE: There's one other aspect of the  
11 venue paragraph that I hate to -- now that we've reached  
12 such a wonderful accord, I hate to bring it up, but I just  
13 want to make clear.

14 THE COURT: Excuse me. I'm sorry to interrupt  
15 you, but I don't recognize your voices. I apologize.

16 MR. VECCHIONE: John Vecchione, again.

17 THE COURT: Thank you, Mr. Vecchione.

18 MR. VECCHIONE: John Vecchione, again.

19 I have a new complaint to file and I take it  
20 because there's been no agreement that I should file that  
21 complaint, there's not going to be any direct filing in  
22 this MDL or at least not without objection and a fight; is  
23 that what I understand, Mr. Huston?

24 MR. HUSTON: No. I think as long as we know  
25 where they're going ultimately and we agree on the

1 appropriate jurisdiction and the Courts can order them, I  
2 see no problem with it.

3 MR. VECCHIONE: All right.

4 MR. HUSTON: Other defendants may disagree, but  
5 that's, I think, the streamlined way of doing it, frankly.

6 MR. VECCHIONE: All right. I will attempt to  
7 file it in the -- it's the Texas v. APP, so I'll just give  
8 you a preview, and I will put that in also by January 7 and  
9 we'll see who salutes and who opposes.

10 MR. HUSTON: Okay.

11 THE COURT: Are there any other defendants on the  
12 line who object? Apparently, not.

13 MS. GAARDER: Hospira does not object. This is  
14 Christina Gaarder for Hospira.

15 THE COURT: Thank you.

16 MR. LIS: Ted Lis on the line from Hollingsworth  
17 LLP for Sandoz. I have no objection, your Honor.

18 THE COURT: Okay, great.

19 MS. TULLA: Nilda Tulla from Goodwin Proctor for  
20 Teva Parenteral Medicines. No objection.

21 MS. KEENAN: And Jenifer Keenan of Alston & Bird  
22 for Bedford Laboratories. No objection.

23 THE COURT: Okay, great. This is so easy I want  
24 to do it all day long.

25 Are we now finished with paragraph 2 to

1 everyone's satisfaction?

2 All right.

3 Paragraph 3, the deadline is January 7. I infer  
4 from the conversation we've had so far that all the  
5 plaintiffs intend to meet it.

6 MR. OSBORN: Yes, your Honor. This is Dan  
7 Osborn.

8 THE COURT: And the defendants, to the extent  
9 they believe that the complaints are subject to Rule 12  
10 dismissal, intend to seek a pre-motion conference by  
11 application to Judge Matsumoto by January 21; is that  
12 right?

13 MR. HUSTON: Yes, your Honor.

14 THE COURT: All right. So that's in place and  
15 there's no debate about it.

16 Number four, it looks like that's proceeding  
17 without any requirement for court intervention at this  
18 juncture.

19 Does anybody disagree?

20 MR. OSBORN: Your Honor, Dan Osborn.

21 I think we are awaiting some proposal or  
22 submission from the defendants, and I guess they've  
23 indicated that in their gender letter, so we're just  
24 standing by.

25 THE COURT: Okay. Number five is authorizations.

1           Why are we still dealing with this, I guess, is  
2 my question?

3           Mr. Vecchione, have you provided undated  
4 authorizations for all plaintiffs on behalf of whom you've  
5 sued?

6           MR. VECCHIONE: I believe I have, but if they are  
7 dated, I will correct that. I might have had them in the  
8 pipeline or people just follow what we've done before, but  
9 I will provide them undated, if they're not.

10           As I understand it from a letter I received last  
11 week, I have three authorizations that were not provided  
12 that the defendants have a problem with for three of my  
13 clients. I have checked. One of the clients died  
14 unbeknownst to me. Two, I am either going to substitute  
15 and provide authorizations by the substituted party or I'm  
16 going to dismiss them, and that's the three authorizations  
17 that I know that the defendants have a problem with. I  
18 have just contacted the next of kin last week, but that's  
19 the only authorization problem I know of. I am happy if  
20 there are others to address them from my clients.

21           THE COURT: Mr. Vecchione, how soon can you  
22 provide these additional authorizations or state that the  
23 claims will not be pursued?

24           MR. VECCHIONE: Well, I expect to do all of that  
25 by January 7.

1 THE COURT: Mr. Osborn?

2 MR. OSBORN: I think, your Honor, we are too  
3 short, Rose and Chandler, and I think the problem we had  
4 with Chandler was our fault and that was Chandler was not  
5 in the Bartoli complaint that we filed on behalf of some  
6 hundred and fifty or so folks. So that one sort of escaped  
7 us because we were dealing with a group that was in the  
8 complaint that we filed as part of the MDL. So we're  
9 trying to get Chandler. I think we'll have those  
10 relatively quickly. The other is Sylvia Rose.

11 Occasionally, your Honor, you run into a client  
12 who says they'll get you things and they just don't. I  
13 have a feeling that we will ultimately be dismissing her  
14 case. And, frankly, if you would give us until the  
15 seventh, too, I think that might be a reasonable date to  
16 allow that process to sort of run its course.

17 THE COURT: Mr. Germany?

18 MR. GERMANY: Judge, as I sit here I'm not aware  
19 that I owe anyone anything, but if somebody on this call  
20 says otherwise, we'll be happy to take care of it no later  
21 than the seventh.

22 THE COURT: Mr. Huston, is there anything you  
23 want to add?

24 MR. HUSTON: No, sir. I think that's fine. I do  
25 believe that, especially with the Court's indication at the

1 last conference that you wanted them to keep undated and  
2 signed authorizations in sort of a database that they could  
3 forward us after ten days of notice, that's the other thing  
4 that I would like to -- and I know that they're on it, so I  
5 think we're making good progress.

6 MS. TULLA: Your Honor, this is Nilda Tulla.

7 THE COURT: Yes.

8 MS. TULLA: I would like to address Mr. Germany's  
9 comment. I believe we're still missing authorizations for  
10 plaintiffs Brooks, Kahn, Lockard, Pace, Ben Smith or June  
11 Peterson.

12 MR. GERMANY: Okay. Do you have a form you want  
13 to email to me?

14 MS. TULLA: I believe it's the form that all of  
15 the other plaintiffs have been using. I can try to track  
16 that down and send that to you.

17 MR. GERMANY: John, can you send that to me?

18 MR. VECCHIONE: I can indeed.

19 MR. GERMANY: We'll take care of that. We'll get  
20 them out tomorrow.

21 THE COURT: All right. So the Court invites a  
22 motion to dismiss to failure to prosecute and violation of  
23 this Court's discovery order for any plaintiff who has not  
24 provided an undated authorization by January 7, 2011, all  
25 right.



1 MR. OSBORN: Your Honor, sorry. I feel like --  
2 Mr. Vecchione, I think everybody is in agreement on this.  
3 I hate to be the center, but --

4 THE COURT: Who is speaking right now? Is that  
5 Mr. Huston?

6 MR. OSBORN: I'm sorry. It's Dan Osborn.

7 THE COURT: Oh, I'm sorry, Mr. Osborn. Go ahead.

8 MR. OSBORN: I know, from my conversation with  
9 Mr. Miller after the last conference, there was some  
10 discussion about undated authorizations. And I don't feel  
11 comfortable providing to -- and I'm not sure why they need  
12 it -- providing to the defendants an undated authorization.

13 THE COURT: Why? What's discomfoting about it?

14 MR. OSBORN: Well, because these authorizations  
15 are generally good for many, many months, and the whole  
16 idea is for the defendants to be able to go out and collect  
17 the records from our folks, and we have no problem with  
18 doing that, that's part of the process. But an undated  
19 authorization sits in their hands and I don't know why they  
20 would need an undated authorization unless --

21 THE COURT: But what happens when it takes them  
22 sixty days to get the records back from the first provider  
23 and then it's a second provider that's noted in those  
24 records that they want to serve? Do they need a new  
25 authorization or can they serve the undated authorization

1 you've already given them?

2 MR. HUSTON: They would need a new authorization,  
3 your Honor, because they'd have to specify a new physician.

4 THE COURT: So these authorizations are provider  
5 specific?

6 MR. HUSTON: Yes.

7 THE COURT: And how long do they last by  
8 operation of law?

9 MR. HUSTON: I don't know by operation of law,  
10 but as we've handled this, the other MDL's, you know we  
11 don't really run into any problems until probably after six  
12 months or so.

13 THE COURT: Well, obviously, some difficulty is  
14 what provoked this. I don't remember the discussion of it  
15 in detail. Mr. Huston, can you refresh me?

16 MS. GAARDER: Your Honor, this is Christina  
17 Gaarder, and I'm the one who first brought this up.

18 THE COURT: Okay.

19 MS. GAARDER: We represent Merk in the Fosamax  
20 Litigation, and this is a routine problem in the Fosamax  
21 Litigation where we have -- and in that litigation they  
22 provide blank authorizations, not provider specific --

23 THE COURT: Right.

24 MS. GAARDER: -- which I had thought was the case  
25 in this litigation as well: We were supposed to get blank,

1 undated authorizations.

2           The plaintiff then, when they fill out the  
3 plaintiff profile forms, which we haven't even settled on  
4 yet, that allows the defendant to send the authorization  
5 out to any provider that's listed in the plaintiff profile  
6 form, collect those records. We often find that the  
7 disclosure of physicians, not intentionally I assume, is  
8 not complete. You know, there's other providers listed in  
9 the first wave of collections. We have to re-send out  
10 authorizations. Six months is a pretty good ballpark for  
11 how long they're honored, some are less, some are more.  
12 But we find ourselves in a continual process of getting --  
13 and in the MDL and Fosamax, this problem wasn't sort of  
14 foreseen. So we end up having to get new authorizations on  
15 a regular basis.

16           THE COURT: Yes. That's been a pretty common  
17 experience of mine as well.

18           Let me ask you this, Mr. Osborn: Assuming that  
19 the defendants were to give you notice every time they  
20 served an authorization, what's the prejudice?

21           MR. OSBORN: Your Honor, I can't give them carte  
22 blanche to go collect records from every doctor that our  
23 client has ever seen. It's got to be related to the case.  
24 I would have no control over that. Especially, and what  
25 would really concern me, is mental health records,

1 your Honor.

2 THE COURT: Don't they have claims for pain and  
3 suffering?

4 MR. OSBORN: Yes, but they don't -- if they want  
5 to get psychiatric records because --

6 THE COURT: So if they're seeing a therapist it's  
7 going to be discoverable anyway.

8 MR. OSBORN: Not necessarily, your Honor, not at  
9 all. If our client is not making a claim for psychological  
10 injury by virtue of the suit, they're not entitled to those  
11 records.

12 THE COURT: Which ones --

13 MS. GAARDER: In the Fosamax Litigation -- and  
14 this is Christina Gaarder again -- there is a requirement  
15 in the authorization that's signed by the plaintiff itself  
16 that we provide notice for the collection of psychological  
17 records. That's not true of just plain old medical records  
18 going to the -- you know, your doctor, to the hospital for  
19 your broken leg.

20 THE COURT: Look --

21 MS. GAARDER: Whatever. But for psychiatric  
22 records, that is a requirement and we, obviously, comply  
23 with that.

24 THE COURT: I want this to move quickly and  
25 easily. I am willing to allow you to work out some

1 limitation on the scope and prior notice with respect to  
2 the service of the authorizations, but I think it's  
3 appropriate to have undated authorizations with this many  
4 plaintiffs spread over this many states and it having taken  
5 this much time to get authorizations to the defendants that  
6 they can use.

7           So you will provide undated authorizations. You  
8 will work through a stipulation or agreement by letter as  
9 to the scope of the authorizations that may be served  
10 without application to the Court and prior notice of the  
11 service of the authorizations, and that's how we're going  
12 to proceed.

13           What else can we say about authorizations?  
14 Anybody? Okay.

15           We are talking about having a status conference  
16 on January 13.

17           MR. VECCHIONE: Hang on, your Honor. There's one  
18 other item before status conference. This is John  
19 Vecchione again.

20           THE COURT: Yes, sir.

21           MR. VECCHIONE: I have -- and Mr. Germany is on  
22 the line. I have had some confusion here. I'm local  
23 counsel for Mr. Germany on many of his cases, not all of  
24 them. They came over here severed from the MDL in  
25 Tennessee, and my question is this:

1 Does Mr. Germany need a pro hoc vice even though  
2 he's admitted in the MDL in Tennessee where they came from  
3 or can he simply make an appearance in this MDL, and does  
4 anyone have an objection to it? That's really what that  
5 little item is on the last part of my item tree.

6 THE COURT: Oh, oh.

7 MR. HUSTON: John, this is Jim Huston. If it's  
8 properly transferred to the MDL, he does not need a pro  
9 hoc.

10 MR. VECCHIONE: That was my feeling. I just  
11 wanted to make sure that I said it on the record and that  
12 nobody had any problem with it.

13 MR. HUSTON: No, that's no problem with us.

14 THE COURT: I can't imagine it would be a problem  
15 for us, but if the Clerk's Office has any difficulty taking  
16 a filing from him or adding him to the ECF notification  
17 list, let me know and we'll work it out.

18 MR. VECCHIONE: Thank you, your Honor.

19 MR. GERMANY: Thank you, Judge.

20 THE COURT: Now, I'm more than happy to make time  
21 for you in mid January. I actually have a bench trial  
22 scheduled on the 13th, but it seems like it's only a short  
23 time away and it's on the eve of the defendants filing  
24 their pre-motion conference application.

25 What do you anticipate we would be discussing at

1 that juncture, Mr. Huston?

2 MR. HUSTON: I think probably what needs to be  
3 discussed at that point is how we're going to do the  
4 pleadings. We expect, as I indicated earlier, two types of  
5 motions: One is if there is lack of clarity on product  
6 identification, we will bring motions based on Iqbal and  
7 Twombly for insufficient specificity in the allegations,  
8 which we can do either all at once or individually on  
9 separate motions. I think one motion would make more  
10 sense.

11 THE COURT: Absolutely.

12 MR. HUSTON: And then secondly we're going to  
13 have to address the surviving cases individually, both on  
14 statute of limitations and on the local law that will apply  
15 to each case as to whether they can even bring the action.  
16 So we will know what we're dealing with after the seventh,  
17 so we can propose to the Court how we think it ought to go  
18 and we can do that in person at a status conference. We  
19 have no problem to sort of make up a plan and propose it at  
20 that date.

21 THE COURT: Does anybody disagree?

22 MR. HUSTON: I can't hear you, Judge.

23 THE COURT: I said: Does anybody disagree?

24 MR. OSBORN: This is Dan Osborn. I guess I'm  
25 just having trouble understanding what the difference would

1 be between that conference and the submission to the  
2 magistrate judge.

3 THE COURT: You mean to the district judge, Judge  
4 Matsumoto.

5 MR. OSBORN: I'm sorry, yes.

6 THE COURT: Yes. I kind of have to agree with  
7 that, Mr. Huston. Why wouldn't you just lay out what it is  
8 you propose in your pre-motion conference application?

9 MR. HUSTON: We could. But as I understand the  
10 pre-motion conference application by letter, you are to  
11 tell the judge the motions that you plan on bringing.  
12 There isn't much of a discussion on which the Court would  
13 prefer, whether they prefer it being done once or one set  
14 of massive pleadings, or how it would be preferred.

15 THE COURT: Well, I think Judge Matsumoto is the  
16 one to make that call, since she's the one who is going to  
17 receive the motion.

18 MR. HUSTON: Certainly.

19 THE COURT: My understanding of the practice  
20 would be that she would receive your letter and then she'd  
21 receive a responsive letter from the plaintiffs, and then  
22 she'd bring everybody in to have the conversation you're  
23 describing.

24 MR. HUSTON: Okay, that's fine. We can lay out  
25 the options in those letters without any problem.



1           THE COURT: I think so. And I suspect if you  
2 asked her, she may have a page limit on her pre-motion  
3 conference applications that might not be appropriate for a  
4 case like this, and I'm pretty confident that if you  
5 requested to exceed her page limit, if she has one, that  
6 she'll understand that this isn't a garden-variety  
7 litigation and afford you the opportunity to be more  
8 expansive.

9           MR. HUSTON: That's what we'll do. And I think  
10 we can probably deal with a lot of it conceptually,  
11 your Honor, at least in the initial stage.

12           THE COURT: So I'm more inclined then -- well,  
13 let me ask you this:

14           I assume after you review the complaints -- I may  
15 be wrong -- that there is going to be some body of  
16 plaintiffs that will survive that scrutiny and that you  
17 won't be make a Rule 12 motion against; is that too  
18 optimistic?

19           Well, maybe you don't want to take a position on  
20 that now. Here's what I do propose:

21           if on your review of the complaints the  
22 defendants decide that there are some plaintiffs with  
23 respect to whom they will not be moving to dismiss, you  
24 should write to me instead of Judge Matsumoto about them,  
25 so we can figure out whether or not discovery against the

1 defendants should proceed, given that some plaintiffs at  
2 least are going to survive Rule 12.

3 Doesn't that make sense?

4 MR. HUSTON: Yes, your Honor.

5 THE COURT: All right. At the same time you file  
6 your pre-motion conference application to Judge Matsumoto,  
7 you'll be sending me a letter either saying that you're  
8 moving with respect to all of the plaintiffs, and,  
9 therefore, it's your position -- and telling me what you  
10 think about whether discovery should proceed or not, or  
11 you'll be telling me that you're only moving against some  
12 of the plaintiffs and proposing what you think discovery  
13 should look like. All right?

14 MR. HUSTON: Yes, sir.

15 THE COURT: Does anybody have anything they want  
16 to add?

17 Well, Happy New Year to all of you. Enjoy the  
18 holidays. It's been my pleasure to speak with you today.

19 We've been on the record. If you want the  
20 minutes of today's proceeding, you may call my clerk,  
21 Ben Wellikson, at 718-613-2563 for further information.

22 Have a great day.

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I certify that the foregoing is a correct transcript  
from the electronic sound recording of the proceedings in  
the above-entitled matter.

A handwritten signature in black ink, appearing to read 'E. Barron', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

December 28, 2010